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## When Lies Go Viral: The First Amendment Implications of Regulating the Spread of Fake News

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# When Lies Go Viral: The First Amendment Implications of Regulating the Spread of Fake News

Madeleine Rosuck\*

## I. INTRODUCTION

In 2017, Dictionary.com added three hundred new words to its website.<sup>1</sup> The site adds words and phrases each year that are searched and used most often, and the 2017 picks offer an alarmingly accurate illustration of the pressing issues that the United States faces today and the way in which American citizens talk about those issues.<sup>2</sup> Of particular note are the added phrases “alt-right,” “kompromat,” and “fake news.”<sup>3</sup> The term “kompromat” is a Russian term meaning “compromising and incriminating material that is sometimes forged or fabricated, used to sabotage or discredit a political opponent or public figure and ultimately destabilize society by causing extreme doubt and cynicism.”<sup>4</sup> The site defines the term “fake news” as “false news stories, often of a sensational nature, created to be widely shared online for the purpose of generating ad revenue via web traffic or discrediting a public figure, political movement, company, etc.”<sup>5</sup> While the jury is still out on who coined the term “fake news,”<sup>6</sup> the fact that the phrase has been used and searched enough to merit its being added to a site averaging 5.5 billion word searches annually is telling.<sup>7</sup>

The significance and popularity of these terms can be traced to the United States’ 2016 presidential election, at which time warnings were first given by the Director of National Intelligence that there were indications of

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1. See AJ Willingham, *Hangry, Sext, Alt-Right: Dictionary.com Adds 300 New Words*, CNN (Apr. 3, 2017), <http://www.cnn.com/2017/04/03/health/dictionary-com-words-added-trnd/index.html>.

2. See *id.*

3. See Alyssa Pereira, *Dictionary.com Adds “Kompromat,” “Fake News,” and More to Online Database*, SFGATE (Sept. 28, 2017), <http://www.sfgate.com/technology/article/Dictionary-com-kompromat-fake-news-alt-12238807.php>.

4. *Id.*

5. *Id.*

6. See Chris Cillizza, Analysis, *Donald Trump Just Claimed He Invented “Fake News”*, CNN (Oct. 26, 2017), <http://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html> (noting that Donald Trump claims that he came up with the term “fake news,” while Merriam-Webster claims that the term was utilized with regularity starting at the end of the 19th century).

7. See *About*, DICTIONARY.COM, <http://www.dictionary.com/e/about/> (last visited Feb. 5, 2019).

cyberattacks against the 2016 presidential election.<sup>8</sup> Since then, the U.S. government and judiciary have exposed a litany of evidence and information substantiating claims regarding interference from foreign countries on the presidential election.<sup>9</sup> The unearthing of this information has led American citizens and officials to ask: Who let this happen?<sup>10</sup>

The answer came from a hearing held on Capitol Hill on November 1, 2017, in which the Senate and House Intelligence Committees directed fire at the leaders of various social media platforms, such as Facebook, Google, and Twitter.<sup>11</sup> During the hearing, the House Intelligence Committee presented numerous examples of accounts and advertisements that were targeted at American citizens and voters during the 2016 presidential election.<sup>12</sup> The focus of the hearing was largely the scolding of social media platforms for “[w]hether knowingly or unknowingly, [helping to] legitimize and spread Russian disinformation.”<sup>13</sup>

In society today, there is an ever-growing presence and influence of social media platforms.<sup>14</sup> Americans increasingly rely on these platforms to receive accurate information.<sup>15</sup> With that reliance comes a responsibility to monitor what is being posted on those sites, not to restrict opinions or speech. Rather, social media platforms need to ensure that the information dissemi-

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8. See Miles Parks et al., *2016 Under Scrutiny: A Timeline of Russia Connections*, NAT’L PUB. RADIO (Oct. 31, 2017), <https://www.npr.org/2017/10/31/537926933/2016-under-scrutiny-a-timeline-of-russia-connections>.

9. See *id.*

10. See Nicholas Fandos et al., *House Intelligence Committee Releases Incendiary Russian Social Media Ads*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-technology-facebook.html>.

11. See *id.*

12. See *id.*

13. *Id.*

14. See *Social Media Fact Sheet*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> (showing roughly sixty percent growth in number of U.S. adults who use at least one social media site from 2006 to 2017) [<https://web.archive.org/web/20180121093422/http://www.pewinternet.org/fact-sheet/social-media/>].

15. See KNIGHT FOUND., *AMERICAN VIEWS: TRUST, MEDIA AND DEMOCRACY* 3 (2018), [https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/242/original/KnightFoundation\\_AmericansViews\\_Client\\_Report\\_010917\\_Final\\_Updated.pdf](https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/242/original/KnightFoundation_AmericansViews_Client_Report_010917_Final_Updated.pdf) (“Underscoring the changing news landscape, equal proportions of Americans rely on social media as rely on newspapers to stay informed.”). *But see id.* at 2 (“Seventy-three percent of Americans say the spread of inaccurate information on the internet is a major problem with news coverage today.”).

nated is verified as true and accurate.<sup>16</sup> Many media platforms on which users regularly rely for accurate news and information have enacted policies to ensure truth and accuracy in the articles and information they circulate.<sup>17</sup> For instance, National Public Radio (NPR) has instituted a social media ethics policy aimed at ensuring the content posted on their site, or spoken about publicly, by their employees is verified as true and accurate.<sup>18</sup> Their policy explicitly demands that employees “[v]erify information before passing it along,” that employees “[b]e honest about [their] intent when reporting,” and that employees also “[a]void actions that might discredit [their] professional impartiality.”<sup>19</sup>

The reasons for requiring articles, news, and information posted on these regularly-visited and relied-on sites to be verified as true and accurate are numerous. In addition to the inherent desire most people have in obtaining information that is verified as true and accurate,<sup>20</sup> “[t]he unmediated character of social media speech also increases its potential for sparking violence.”<sup>21</sup> This is because social media platforms inherently allow for a greater number of people to participate in unmediated communication which increases the probability of incendiary speech and—because of the size of the online audience—can, in turn, increase the potential for violent reactions to that speech.<sup>22</sup> This is where the First Amendment argument for the protection of free speech becomes especially important. Proponents of free speech argue that social media companies have no standing to limit opinions and ideas as expressed on their platforms.<sup>23</sup> These critics have legitimate arguments re-

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16. Cf. *id.* at 2 (noting that the public agrees information needs to be verified but is split on who should be held responsible for ensuring its accuracy).
  17. See, e.g., *About The Economist: Fact-Checking Standards*, THE ECONOMIST, <https://www.economist.com/about-the-economist#fact-checking-standards> (last visited Feb. 5, 2019); *Policies and Standards*, WASH. POST (Jan. 1, 2016), <https://www.washingtonpost.com/news/ask-the-post/wp/2016/01/01/policies-and-standards/>.
  18. See *Social Media*, NAT’L PUB. RADIO: NPR ETHICS HANDBOOK, <http://ethics.npr.org/tag/social-media/> (last visited Feb. 5, 2019).
  19. See *id.*
  20. See *A New Understanding: What Makes People Trust and Rely on News*, AM. PRESS INST. (Apr. 17, 2016), <https://www.americanpressinstitute.org/publications/reports/survey-research/trust-news/> (showing survey results that eighty-five percent of respondents “say accuracy is a critical reason they trust a news source”).
  21. LyriSSa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 149 (2011).
  22. See *id.*
  23. See, e.g., Charles Arthur, *Twitter Faces Censorship Backlash*, THE GUARDIAN (Jan. 27, 2012), <https://www.theguardian.com/technology/2012/jan/27/twitter-faces-censorship-backlash> (explaining that Twitter received considerable back-

garding the limits of the constraints on free speech.<sup>24</sup> However, their arguments fail to address situations in which the speech being promoted is likely, if not certain, to incite violence, which is a valid and widely-accepted exception to the protection afforded by the First Amendment.<sup>25</sup>

This Comment will argue that social media companies have both ethical and social obligations to monitor the information being shared on their platforms and to ensure that the information shared is verified as true and accurate. Accordingly, this Comment will analyze the arguments presented by both supporters and opponents of this idea and will supply a reasoned analysis for why the obligations incurred by these social media companies override the conflicting arguments for complete First Amendment protection. First, this Comment will provide a summary of the use and influence of social media platforms due to their reach and prevalence and analyze arguments regarding the responsibilities of social media platforms. Next, this Comment will analyze the ability of social media platforms to censor information. Finally, this Comment will suggest a solution for how to overcome the conflicting arguments and how to regulate posted information in a way that both protects free speech and ensures that the information circulated on these sites is verified as true and accurate.

## II. THE REACH AND INFLUENCE OF SOCIAL MEDIA PLATFORMS

In today's age, social media platforms are the dominant way in which Americans receive information.<sup>26</sup> In order to understand the sheer scale, reach, and influence that social media platforms have on users and the information they receive, it is important to examine the statistics.

### A. Social Media Users

In 2017, sixty-nine percent of Americans were active users of social media sites.<sup>27</sup> Seventy percent of Americans use social media platforms specifically to "connect with one another, engage with news content, [and] share

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lash when the company revealed that it had implemented a system that would allow the platform to withhold particular tweets from specific countries, on a case-by-case basis).

24. See Joel Feinberg, *Limits to the Free Expression of Opinion*, in PHILOSOPHY OF LAW 379, 379 (Joel Feinberg & Jules Coleman, eds., 7th ed. 2004) (explaining the view of John Stuart Mill that suppression of speech is always worse than the speech itself).

25. See *id.*

26. See Chava Gourarie, *Censorship in the Social Media Age*, COLUMBIA JOURNALISM REV. (Jan. 21, 2016), [https://www.cjr.org/analysis/censorship\\_in\\_the\\_social\\_media\\_age.php](https://www.cjr.org/analysis/censorship_in_the_social_media_age.php).

27. *Social Media Fact Sheet*, *supra* note 14.

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information.”<sup>28</sup> Of the major social media platforms, Facebook is the most widely used.<sup>29</sup>

## B. Facebook

In 2016, nearly thirty-nine percent of the world’s population used Facebook.<sup>30</sup> In fact, Facebook is used in over sixty countries.<sup>31</sup> As of 2017, Facebook had 2.07 billion monthly active users,<sup>32</sup> about 1.74 billion of which were mobile users<sup>33</sup> and 1.4 billion of which were active on Facebook daily.<sup>34</sup> Approximately seventy-six percent of American Facebook users check Facebook at least once a day.<sup>35</sup>

In addition to these global facts, the statistics of American Facebook users in 2016—the year of the presidential election—are staggering. Facebook usage was consistent across various age and ethnic groups.<sup>36</sup> In 2016, eighty-one percent of Americans aged eighteen to twenty-nine used Facebook, and nearly eighty percent of Americans aged thirty to forty-nine used the site.<sup>37</sup> Seventy-three percent of Hispanics used the site, as did sixty-seven percent of Caucasians and seventy percent of African Americans.<sup>38</sup> Interestingly, in 2016, those with an income of \$30,000 a year or above utilized the site eleven to eighteen percent more often than those with incomes below \$30,000.<sup>39</sup> In addition, those with at least some collegiate education

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28. *Social Media Fact Sheet*, *supra* note 14.

29. *Social Media Fact Sheet*, *supra* note 14.

30. See Kit Smith, *Marketing: 47 Facebook Statistics for 2016*, BRANDWATCH.COM (Dec. 5, 2017), <https://www.brandwatch.com/blog/47-facebook-statistics-2016/>.

31. See *You Want an Interactive Map of Where Facebook is Used?*, THE GUARDIAN: TECHNOLOGY BLOG (Jul. 22, 2010), <https://www.theguardian.com/technology/blog/2010/jul/22/facebook-countries-population-use>.

32. *Company Info*, FACEBOOK, <https://newsroom.fb.com/company-info/> (last visited Feb. 5, 2019) [<https://web.archive.org/web/20180119182513/https://newsroom.fb.com/company-info/>].

33. See *Number of Mobile Monthly Active Facebook Users Worldwide from 1st Quarter 2009 to 4th Quarter 2016 (in Millions)*, STATISTA, <https://www.statista.com/statistics/277958/number-of-mobile-active-facebook-users-worldwide/> (last visited Feb. 5, 2019).

34. *Company Info*, *supra* note 32.

35. See *Social Media Fact Sheet*, *supra* note 14.

36. See *Social Media Fact Sheet*, *supra* note 14.

37. See *Social Media Fact Sheet*, *supra* note 14.

38. *Social Media Fact Sheet*, *supra* note 14.

39. See *Social Media Fact Sheet*, *supra* note 14.

were almost twenty percent more likely to use Facebook than those without.<sup>40</sup>

Facebook usage covers all demographics.<sup>41</sup> The statistics clearly show that Facebook crosses national borders, jumps racial and ethnic divides, and influences people of all ages and socioeconomic statuses.<sup>42</sup> For many in these diverse populations, Facebook has been used not only as a social networking platform, but increasingly as an information-gathering tool.

### C. Politics and Social Media

In 2015, sixty-one percent of Millennials indicated that they looked to Facebook most often for their political news.<sup>43</sup> This trend is telling as the percentages increase. In addition, Millennials are far less familiar than Gen Xers and Baby Boomers with other news sources such as *The New Yorker*, *NPR*, *The Wall Street Journal*, *The Washington Post*, *Politico*, *Bloomberg*, and *Breitbart*.<sup>44</sup> Notably, a quarter of Millennial Facebook users say that approximately half of the posts they see on Facebook pertain to the government and politics, but they are less likely to see content on Facebook that supports their own political and social views.<sup>45</sup> This has led to frustration among many Facebook users searching for political news.<sup>46</sup> More than half of social media users describe their online interactions with social media platforms as both stressful and frustrating especially because of content they disagree with politically.<sup>47</sup> Regardless of the political leanings of the content they encounter, social media users are overwhelmed with the volume of political content they encounter online.<sup>48</sup> More than one-third of social media users report being irritated and “worn out” by the sheer amount of political content that they encounter on social media sites.<sup>49</sup>

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40. See *Social Media Fact Sheet*, *supra* note 14.

41. See *Social Media Fact Sheet*, *supra* note 14.

42. See, e.g., *Social Media Fact Sheet*, *supra* note 14.; *You Want an Interactive Map of Where Facebook is Used?*, *supra* note 31.

43. See Jeffrey Gottfried & Michael Barthel, *How Millennials' Political News Habits Differ from Those of Gen Xers and Baby Boomers*, PEW RES. CTR. (June 1, 2015), <http://www.pewresearch.org/fact-tank/2015/06/01/political-news-habits-by-generation/>.

44. See *id.*

45. See *id.*

46. See Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, PEW RES. CTR. (Oct. 25, 2016), <http://www.pewinternet.org/2016/10/25/the-political-environment-on-social-media/>.

47. See *id.*

48. See *id.*

49. See *id.*

That being said, when it came to the 2016 presidential election, nearly one-third of eighteen to twenty-nine-year-olds said that social media was the most helpful source for learning about the election.<sup>50</sup> Overall, just over half of all social network users learned about the presidential election from a social media site.<sup>51</sup> A final interesting statistic about social media site usage and the presidential election is that while those with higher incomes were more likely to use social networking sites generally, including to gather information, lower income users were those more likely to actually share and rely on election-related content.<sup>52</sup>

These statistics are important as they indicate the amount of political information available on social media platforms and the number of people who rely on this information. In fact, many users—including a growing number of users without college degrees—indicated that social media platforms are their primary source of information.<sup>53</sup> These statistics are also significant in that they imply the breadth of the various types of political ideas and opinions that circulate online. With the sheer amount of information on these sites, and the number of people who turn to them for information, it is natural and expected that a social media platform should take responsibility for the content shared on its site.<sup>54</sup>

### III. RESPONSIBILITIES OF SOCIAL MEDIA PLATFORMS

Considering the extent of the reliance on social media platforms to distribute an accurate and holistic account of relevant news and information, there is necessarily a responsibility for social media platforms to regulate, to a certain extent, the information posted on their sites.<sup>55</sup> Due to the increased use and prevalence of social media, the case has been made that “it is seemingly one’s civic duty to participate in these online services because ‘[p]resence on the Internet is effectively a requirement for fully and effec-

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50. See Jeffrey Gottfried et al., *The 2016 Presidential Campaign – A News Event That’s Hard to Miss*, PEW RES. CTR. (Feb. 4, 2016), <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>.

51. See *id.*

52. See *id.*

53. See Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> (pointing out that social media news use is growing among those with less education attainment and showing no other news source gets more than thirty-three percent consumption from news consumers on Facebook).

54. See *Face Up to Responsibility, Facebook and Friends*, FIN. TIMES: THE FT VIEW (Nov. 15, 2016), <https://www.ft.com/content/eef5c544-ab23-11e6-9cb3-bb8207902122?mhq5j=e7>.

55. See *id.*



tively participating in the [twenty-first] century as a citizen.’”<sup>56</sup> As such, the failure of social media platforms to recognize their responsibility to disseminate accurate information “would open the compan[ies] to liability ‘for [their] negligence in disseminating tortious material.’”<sup>57</sup> Before delving further into social media companies’ responsibilities to disseminate accurate information, it is first necessary to understand why social media platforms should care about and pay close attention to the information being shared and promoted on their platforms and why they are under such severe scrutiny for not doing so.

#### A. Evidence Supporting the Regulation of Online Platforms

The effects of fake news were seen most prominently during the 2016 presidential election. In late April 2016, Democratic Party National Committee (DNC) leaders were approached by their Information Technology team and informed of unusual network activity on their servers.<sup>58</sup> Amy Dacey, Chief Executive Officer of the DNC, spoke with DNC lawyer, Michael Sussman, to discuss the severity of the activity.<sup>59</sup> Sussman is also a partner at Perkins Coie in Washington, D.C. and a former federal prosecutor for computer crimes cases.<sup>60</sup> Sussman then called Shawn Henry, as President of CrowdStrike, a cyber firm dedicated to investigating cyber hacking activity.<sup>61</sup> CrowdStrike responded immediately by installing software on the DNC’s computers allowing the team to analyze data showing who gained access, when they gained access, and how they gained access.<sup>62</sup>

Eventually, self identified Romanian hacker “Guccifer 2.0” claimed credit for the hack and leak of documents to the media.<sup>63</sup> Some security ana-

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56. See Adam Thierer, *The Perils of Classifying Social Media Platforms as Public Utilities*, 21 COMM.LAW CONSPPECTUS 249, 255 (2013) (alteration in original) (quoting Zeynep Tufekci, *Google Buzz: The Corporatization of Social Commons*, TECHNOSOCIOLOGY (Feb. 17, 2010), <http://technosociology.org/?p=102>).

57. See *id.* at 255 (quoting Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET* 155, 170 (Saul Levmore & Martha C. Nussbaum, eds. 2010)).

58. See Ellen Nakashima, *Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump*, WASH. POST (June 14, 2016), [https://www.washingtonpost.com/world/nationalsecurity/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0\\_story.html?utm\\_term=.e774dfa69bdb](https://www.washingtonpost.com/world/nationalsecurity/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html?utm_term=.e774dfa69bdb).

59. See *id.*

60. *Id.*

61. See *id.*

62. *Id.*

63. See Lauren Carroll, *What We Know About Russia’s Role in the DNC Email Leak*, POLITIFACT (July 31, 2016, 6:13 PM), <http://www.politifact.com/truth-o-meter/article/2016/jul/31/what-we-know-about-russias-role-dnc-email-leak/>.

lysts have since concluded that Guccifer 2.0 is likely to be the public persona of a Russian hacking group.<sup>64</sup> The Office of the Director of National Intelligence corroborated this idea by stating that the Department of Homeland Security (DHS) believed, “based on the scope and sensitivity of these efforts, that only Russia’s senior-most officials could have authorized these activities.”<sup>65</sup> Since the beginning of the accusations against Russia, President Vladimir V. Putin has denied involvement.<sup>66</sup> However, Putin has previously referred to the hack as a “public service,” and then-candidate Donald Trump invited Russian hackers to find the missing emails from the private server Hillary Clinton used during her time as Secretary of State.<sup>67</sup>

Despite the overwhelming majority of experts who believe that all of the evidence points to Russian officials as the culprits of the leak, several experts are skeptical.<sup>68</sup> For example, Jeffrey Carr, Chief Executive Officer of Taia Global cybersecurity firm, opined that while many of the technical indicators from this hacking were publicly admitted Russian tactics, he found issue with Russian motive.<sup>69</sup> While it is certainly possible that Russia wanted to help or hurt certain presidential candidates in one way or another (a reason many believe to be the basis of the cyberattack), Carr said the evidence provided seemed purely speculative and could not be considered anything more than a “conspiracy theory.”<sup>70</sup> One expert maintains that an assertion against the Russians “requires a lot more caution than the media have been giving it thus far, and [is] something for which we have much less solid evidence.”<sup>71</sup>

Regardless of these criticisms, the U.S. government subsequently released two announcements officially accusing the Russian government of the hack. The first was a letter posted online on December 16, 2016 by the DHS and Office of the Director of National Intelligence.<sup>72</sup> The letter stated that the cyberattacks were “intended to interfere with the U.S. election process” and

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64. *See id.*

65. *See* Spencer Ackerman & Sam Thielman, *US Officially Accuses Russia of Hacking DNC and Interfering with Election*, THE GUARDIAN (Oct. 8, 2016), <https://www.theguardian.com/technology/2016/oct/07/us-russia-dnc-hack-interfering-presidential-election>.

66. *See* Alan Rappeport, *New Documents Released From Hack of Democratic Party*, N.Y. TIMES (Sept. 13, 2016), [http://www.nytimes.com/2016/09/14/us/politics/dnc-hack.html?\\_r=0](http://www.nytimes.com/2016/09/14/us/politics/dnc-hack.html?_r=0).

67. *See id.*

68. Carroll, *supra* note 63.

69. *See* Carroll, *supra* note 63.

70. *See* Carroll, *supra* note 63.

71. *See* Carroll, *supra* note 63.

72. *See* Pamela Engel, *The US has Officially Accused Russia of Hacking the Democratic Party*, BUS. INSIDER (Oct. 7, 2016), <http://www.businessinsider.com/us-russia-hacking-democratic-party-dnc-leaks-2016-10>.

accused senior officials in the Russian government of approving the hacking activity.<sup>73</sup> The second announcement was a more thorough investigative report issued jointly by the FBI and DHS linking the Russian government to the hacks of the Democratic Party organizations.<sup>74</sup> It also provided technical details regarding the mechanisms used by Russian civilian and military intelligence services to “compromise and exploit networks and endpoints associated with the U.S. election.”<sup>75</sup> The report goes on to state that the U.S. government confirmed that two different Russian intelligence services participated in the hacking.<sup>76</sup>

First, a hacking group, APT 29, began a spearphishing<sup>77</sup> campaign in the summer of 2015. The group sent emails to over 1,000 DNC-affiliated individuals containing a malicious link to entice recipients to click on it, which allowed the hackers access to the recipient’s data.<sup>78</sup> Second, in the spring of 2016, another hacking group called APT 28 attacked the Democratic party via targeted spearphishing.<sup>79</sup> This time, the sham email tricked users into changing their passwords via a fake webmail domain hosted on APT 28’s network.<sup>80</sup> APT 28 gained access to and stole the content, leading to the unauthorized publishing of thousands of emails from multiple DNC senior party officials.<sup>81</sup> Third, according to the investigative report, Russian intelligence services continued to launch spearphishing campaigns on the Democratic party even after the election, up to one day after the national vote was taken.<sup>82</sup>

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73. *Id.*

74. U.S. DEP’T OF HOMELAND SEC. & FED. BUREAU OF INVESTIGATION, JAR-16-20296, GRIZZLY STEPPE – RUSSIAN MALICIOUS CYBER ACTIVITY 1 (2016) [https://www.us-cert.gov/sites/default/files/publications/JAR\\_16-20296A\\_GRIZZLY%20STEPPE-2016-1229.pdf](https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf) [hereinafter JAR-16-20296]; *see also* Katie Bo Williams, *FBI, DHS Release Report on Russia Hacking*, THE HILL (Dec. 29, 2016), <http://thehill.com/policy/national-security/312132-fbi-dhs-release-report-on-russia-hacking>.

75. JAR-16-20296, *supra* note 74, at 1.

76. The hacking groups were assigned different nicknames by different analysts despite reference to the same groups. *See* JAR-16-20296, *supra* note 74, at 2. For the sake of consistency, this Comment will refer to the groups as APT 29 and APT 28. Ackerman & Thielman, *supra* note 65.

77. A spearphishing campaign is when hackers trick users into clicking bogus website links that either deploy malware into the network or direct the user to a fake webmail domain hosted on the hacker’s network. *See* Williams, *supra* note 74.

78. JAR-16-20296, *supra* note 74, at 2–3.

79. *See* JAR-16-20296, *supra* note 74, at 3.

80. JAR-16-20296, *supra* note 74, at 3.

81. *See* JAR-16-20296, *supra* note 74, at 3.

82. Williams, *supra* note 74.

In addition to the fact that the publishing of the leaked emails was disparaging, publishing documents pertaining to campaign strategy also “weaponized” against the American political system, causing “demonstrable harm to the national security interests, foreign relations or economy of the U.S., or the public confidence, civil liberties or public health and safety of the American people.”<sup>83</sup> These significant, complex, and damaging efforts by foreign entities to influence U.S. elections through the use of technology should be a major cause of concern to social media platforms. As the information regarding the 2016 election hacking scandal exemplifies, there are people, entities, and governments actively trying to interfere with the United States’ governmental, societal, and political processes.

There are identified sources who seek to disrupt the functioning of society by attempting to incite chaos and wreak havoc.<sup>84</sup> Importantly, they are attempting to do so by infiltrating the internet and abusing various online sources in different ways.<sup>85</sup> Given the extent and gravity of the hacks during the 2016 election, social media companies should recognize that any foreign influence over the internet is a legitimate threat to the public’s interest. Social media companies should acknowledge that their platforms may become a means by which people and countries with injurious intent might choose to launch their attacks.<sup>86</sup> With an understanding of the injurious motives and intent of people seeking to disrupt American society and their preferred means and strategies for doing so, it is important to analyze the reach of social media platforms in considering their social and ethical obligations to monitor the content posted on their sites.

## **B. Social Media Platforms: Reach and Audience**

Social media companies have come under the spotlight in regard to the dissemination of fake news and inaccurate information for various reasons. First, as stated above, there has been a sharp and significant increase in social media use generally.<sup>87</sup> With this increase in use, social media platforms should be more supervisory of the content displayed on their sites, because the impact of any one piece of content is magnified by the sites’ increasingly large audience. Second, social networks have enabled anyone in any country to post information, create their own content, and share links from their own

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83. See David E. Sanger & Eric Schmitt, *Spy Agency Consensus Grows That Russia Hacked D.N.C.*, N.Y. TIMES (July 26, 2016), [http://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html?\\_r=0](http://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html?_r=0).

84. See *id.*

85. See *id.*

86. *Id.*

87. See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 215 (2017).

websites.<sup>88</sup> Third, the fact social media platforms are designed to promote all content (verified or not) at an expedited rate nearly ensures that fake news is posted and re-posted without fact-checking or verification.<sup>89</sup> In fact, “[c]ontent can be relayed among users with no significant third party filtering, fact-checking, or editorial judgment.”<sup>90</sup> Fourth, unlimited profiles can be created on these sites, giving hostile and anonymous forces public platform with which to spread disinformation. The number of users associated with these platforms and the reach of all information posted has led to a serious debate regarding whether social media platforms are actually “public utilities” and, thus, whether they should be regulated as such.

### C. Social Media Platforms as “Public Utilities”

The internet has become a fundamental pillar of society today. Indisputably, the internet functions as a place for gathering news and information, building businesses, networking, and connecting.<sup>91</sup> It functions as a platform for communication and expression of ideas.<sup>92</sup> This is exemplified by the increase in the use of social media.<sup>93</sup> This requires consideration as to how the internet is regulated at a governmental level, beginning with an understanding of the internet as a public utility. A “public utility” is defined as “a private business organization, subject to governmental regulation, that provides an essential commodity.”<sup>94</sup> Given the influence that the internet has on society today, it is not unreasonable to deem the internet an essential commodity. In fact, social media sites may constitute essential commodities, because they provide communication and interpersonal connection at a global level.

People are able to build and maintain their businesses online.<sup>95</sup> Working from home is possible because of the internet.<sup>96</sup> Social media and the internet are no longer used merely as means of entertainment; it can also account for people’s entire livelihoods.<sup>97</sup> The internet has allowed ordinary people and businesses alike to reach a global audience.<sup>98</sup> Social media and the internet

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88. *See id.* at 214.

89. *See id.* at 211.

90. *Id.*

91. *See* Ambrose Thompson, *Social Media as Public Expectation: The New Public Utility*, N.Y. PUB. LIBR. (June 30, 2010), <https://www.nypl.org/blog/2010/06/30/social-media-public-expectation>.

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *See id.*

97. *See* Thompson, *supra* note 91.

98. *See* Thompson, *supra* note 91.

also have the rare ability to equalize and humanize people of all different races, religions, socioeconomic backgrounds, and education levels by acting as an accessible resource for most people around the world.<sup>99</sup> Overall, the internet has become “a crucial aspect of how we conduct our social, political, and professional business in the global world.”<sup>100</sup> In addition to all of the other relevant functions listed above, it is difficult to imagine a world as highly-functioning as the one we live in without the presence of such advanced and important technology.<sup>101</sup>

Integral to the concept of public utilities is the idea that “the needs of the public for access are important and must be looked out for,” despite the fact public utilities are almost always owned and operated by for-profit corporations.<sup>102</sup> As such, public utilities generally require increased governmental oversight and regulation.<sup>103</sup> In practice, and as it pertains to social media and the internet, this generally “entail[s] greater regulation of those sites’ structures and business practices.”<sup>104</sup> Historically, there have been valid arguments both in support and opposition of this idea.

Understandably, proponents of the argument that social media and the internet are utilities demand increased regulation.<sup>105</sup> These proponents believe that since these sites have become inherent aspects of society which would disadvantage those who do not participate, regulations should be in place to protect personal identities, information, thoughts, and ideas.<sup>106</sup> Proponents also argue that a lack of governmental regulation would cause these sites and platforms to turn into a monopoly, so as to evade—intentionally or not—any regulation or any necessary reprimand because of their sheer size and influence.<sup>107</sup> Essentially, proponents fear these companies, if unregulated, will grow to accumulate so much power that any regulation sought to be imposed on them in the future would be entirely ineffective, if not completely impossible.<sup>108</sup>

Opponents of that argument assert that “social media platforms do not resemble traditional public utilities” and, therefore, should not be regulated

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99. See Thompson, *supra* note 91.

100. Thompson, *supra* note 91.

101. See Thompson, *supra* note 91.

102. See Thompson, *supra* note 91.

103. See Thierer, *supra* note 56, at 255.

104. See Thierer, *supra* note 56, at 250.

105. See Danah Boyd, *Facebook Is a Utility; Utilities Get Regulated*, ZEPHORIA (Mar. 15, 2010), <http://www.zephoria.org/thoughts/archives/2010/05/15/facebook-is-a-utility-utilities-get-regulated.html>.

106. See *id.*

107. See *id.*

108. See *id.*

as such.<sup>109</sup> Opponents also argue treating these social media sites as public utilities will ultimately cause them to both convert into, and function as, natural monopolies.<sup>110</sup> Finally, opponents believe regulation inherently and consistently inhibits the innovation of companies which attribute their success almost entirely to that very innovation.<sup>111</sup> Ultimately, the argument for or against governmental regulation of social media and the internet is integral to the protection and regulation of the content posted on social media and the internet. Therefore, it is pertinent to the fundamental basis for the debate regarding governmental regulation to analyze the First Amendment and understand its application and its limits.

#### IV. THE FIRST AMENDMENT AND CENSORING INFORMATION

The enduring debate revolving around the First Amendment and the ability to censor certain information has become even more relevant and hotly-contested with the rise of social media use. Two questions seem to arise most often when considering the topic: (1) what actual protections does the First Amendment afford?; and (2) just how far do those protections go? Recently, in accordance with the rise of social media and the internet, the question of what ability social media platforms have to censor information has arisen more and more frequently and is worth a detailed analysis. First, however, it is important to understand the basic constructs of the First Amendment as well as the protections it affords and the limits by which it is constrained.

##### A. A General Understanding of the First Amendment

The First Amendment of the Constitution guarantees freedom of expression by prohibiting Congress from restricting or limiting citizens' right to speak freely.<sup>112</sup> Historically, the First Amendment issues involved in some of the most significant cases in American history have ranged from what topics may be discussed in high school textbooks<sup>113</sup> to whether it is unconstitutional to burn a flag in protest of American politics.<sup>114</sup> The landmark case *Schenck v. United States* set out the test most appropriate to determine First Amendment issues.<sup>115</sup> In its holding, the Court asserted that the question to be con-

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109. See Thierer, *supra* note 56, at 250.

110. See Thierer, *supra* note 56, at 250–51.

111. See Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 580 (1969).

112. U.S. CONST. amend. I.

113. See generally *Smith v. Bd. of Sch. Com'rs of Mobile Cty.*, 827 F.2d 684 (11th Cir. 1987).

114. See generally *Tex. v. Johnson*, 41 U.S. 397 (1989).

115. See *Schenck v. United States*, 249 U.S. 47 (1919).

sidered in every First Amendment case is “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>116</sup> The Court further noted that the fundamental factors to be considered when looking at a First Amendment case are both the proximity and the degree of the language used to the dangers that the speech might elicit.<sup>117</sup>

The introduction of the internet required this standard to be applied in ways not previously considered. Courts recognized early on that the internet was “the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”<sup>118</sup> As such, the internet has provided a forum that supports the guarantees of the First Amendment and the expression of free speech more fundamentally than, arguably, any other platform ever created. With that type of power, however, comes a significant responsibility. Both internet sites and the government have long struggled with trying to figure out a balance in protecting free speech and free expression on internet sites. This inherently calls for some type of government regulation which will not ultimately diminish the utility of these sites in promoting the freedom of speech.<sup>119</sup>

This dynamic is complex and has a complicated history. When the internet first became relevant, the government required websites not discriminate against any of the content posted.<sup>120</sup> However, as recent cases exemplify,<sup>121</sup> the government has begun to encourage those same sites to discriminate against the type and substance of content posted.<sup>122</sup> The very fact that the government has encouraged the discrimination and self-regulation of these sites in regards to the content, news, and information their users are posting brings up a significant First Amendment problem. Specifically, the government, in implying that sites should be posting some content but not all of it, is effectively encouraging internet sites to regulate and discriminate against the content posted on their sites, which is, in itself, a form of limiting expression.<sup>123</sup> Problems like this one have made First Amendment issues regarding the internet a particularly difficult topic. For that reason, it is necessary to analyze the ability and responsibilities of social media platforms to

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116. *See id.* at 52.

117. *See id.*

118. *See* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

119. Dawn C. Nunziato, *First Amendment Values for the Internet*, 13 FIRST AMEND. L. REV. 282, 308–09 (2014).

120. *See id.* at 282.

121. *See generally* Verizon v. Fed. Comm. Commission, 740 F.3d 623 (D.C. Cir. 2014).

122. Nunziato, *supra* note 119, at 282.

123. *See* Nunziato, *supra* note 119, at 295.



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monitor and regulate the content, news, and information being posted on their individual platforms.

### **B. Ability of Social Media Platforms to Censor Information**

The first big question at issue is whether social media and websites are even able to censor, regulate, and monitor the information being posted on their sites. In assessing this question, it seems that online platforms have gone back to the initial test first set out in *Schenck*, which considers the potential violence and evil that could be elicited from the deregulation of free speech, in determining the appropriate level of regulation and restriction on the speech and content posted. Although the Supreme Court did not discuss free speech and the regulation of materials distributed via the internet until 1997,<sup>124</sup> the Supreme Court has evidently long favored the idea of private platforms having the power to regulate the content posted on their sites.

The Supreme Court's attitude regarding the regulation of speech is shown in *Turner Broadcasting Systems, Inc. v. Federal Communication Commission*, where the Court advised that:

The potential for abuse of private power over a central avenue of communication cannot be overlooked. . . . Each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.<sup>125</sup>

Although this excerpt pertained to the ability of cable television stations to monitor content, the idea applies to social media and websites as well.<sup>126</sup> In considering the internet as a content provider, it is clear these websites and platforms "exercise substantial control of critical pathways of communication and enjoy the power to threaten the free flow of information and ideas—power that should be held in check under a proper understanding of the First Amendment."<sup>127</sup> Social media and internet companies have been censoring the content, news, and information posted on their sites.<sup>128</sup> These sites and platforms get their support in censoring speech namely from the fact that most of the platforms are privately held companies instead of public conduits

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124. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

125. *Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n*, 512 U.S. 622, 657 (1994).

126. See DAWN C. NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE 2* (2009).

127. *Id.*

128. See *id.*

of speech, which could have less backing to restrict and censor the content being shared.<sup>129</sup>

With that said, users of these sites want minimal censorship and largely demand content only be censored for legitimate and substantial reasons. It is widely recognized that social media and internet platforms cannot merely silence “the ordinary murmurings and objections of a hostile audience,” but rather may punish a speaker for speech that is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”<sup>130</sup> This distinction has long been noted and litigated, but the standards for what constitutes a potential “breach of peace” such that it would require regulation and censorship has long been established.<sup>131</sup> In *Terminiello v. City of Chicago*, “breach of peace” was defined as injurious speech which “stirs the public to anger, invites dispute, brings about a condition or unrest, or creates a disturbance.”<sup>132</sup> The “breach of peace” limitation is understandable and widely accepted. The bigger issues pertaining to censorship on internet sites and platforms come from smaller, less obvious instances of censorship which draw far blurrier lines when considering First Amendment issues.

### C. What Content Can Be Censored

In establishing the responsibilities and obligations social media and internet platforms have in censoring certain content, news, and information posted on their respective sites and platforms, it is important to also understand what content—if any—could be censored, as well as the parameters of the responsibilities of social media sites for doing so. These social media and internet platforms have the responsibility to censor information that could be so inflammatory as to incite violence and aggression or which create a disturbance.<sup>133</sup> There is no doubt these social media and internet platforms are allowed to use their own discretion to determine what content could be seen as so upsetting that it should not be posted on the platform. However, this relatively broad rule that many social media and internet platforms adhere to leaves an incredible amount of room for interpretation and discretion on the part of the social media or internet platforms individually.

While the argument that certain content might incite violence or be so offensive as to disrupt the public peace is one that is easily proven, it is far more difficult to face a challenge many social media and internet platforms have faced more recently: deciphering what news is verified and accurate and what news is fake news. The issue confronting social media companies and

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129. *See id.*

130. *See* Lidsky, *supra* note 21, at 153.

131. *See generally* *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

132. *Id.*

133. *See id.*; *see also* Lidsky, *supra* note 21, at 153.

various internet sites today is determining to what extent they have to verify the information and news articles being circulated on their sites. There has long been a debate regarding the protection of free speech and the ethical implications of disseminating information which is not necessarily verified or true.<sup>134</sup> Specifically, it has long been debated whether information which is knowingly untrue is protected under the guise of “free speech.”<sup>135</sup>

Joel Feinberg addresses the dichotomy between freedom of expression and the betterment of society by categorizing ways in which misinformation can be strictly prohibited.<sup>136</sup> Feinberg starts his paper by explaining the views of John Stuart Mill who believed in the totally free expression of opinion.<sup>137</sup> Feinberg challenges Mill’s argument that the complete, unfettered, unrestricted freedom of expression is advantageous for society and argues against “the inalienable right to say what one pleases whether it’s good for society or not.”<sup>138</sup> Feinberg challenges the idea by retorting that “if liberty of expression is justified only because it is socially useful, then some might think that it is justified only *when* it is socially useful.”<sup>139</sup> His argument perfectly exemplifies the inherent controversy in the relationship between the idea of freedom of expression and the necessary regulation of certain material. Feinberg’s paper captures the dilemma society faces where people want to be able to spread ideas and information worth spreading but struggle with identifying the point at which those ideas cease to be helpful and beneficial to society.

The idea is a novel one and, in his paper, Feinberg explains that there are a few, specific conditions under which free speech should be restricted for the betterment of society.<sup>140</sup> The first such category is defamation. Feinberg argues that defamation is one category which has the potential of causing far more harm than good.<sup>141</sup> However, Feinberg also argues that there are benefits to the threat of defamation, such as the fear of potential exposure encouraging individuals to avoid wrongdoing.<sup>142</sup> He also defends defamation by asserting that the public’s interest in truth is so great that it should always outweigh a private person’s interest in their reputation.<sup>143</sup> Notably, even in his own paper arguing for the restriction of certain speech, Feinberg cannot

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134. See Feinberg, *supra* note 24, at 380–81.

135. See Feinberg, *supra* note 24, at 380–81.

136. See Feinberg, *supra* note 24, at 381.

137. See Feinberg, *supra* note 24, at 381.

138. See Feinberg, *supra* note 24, at 381.

139. Feinberg, *supra* note 24, at 381.

140. Feinberg, *supra* note 24, at 381.

141. See Feinberg, *supra* note 24, at 382.

142. Feinberg, *supra* note 24, at 383.

143. See Feinberg, *supra* note 24, at 383.

help but advocate for the other side of the argument. This exemplifies the difficulties of the argument to restrict the freedom of speech; many believe in restricting certain speech, but nevertheless still have qualms about doing so.

In addition to defamation, Feinberg also argues that, often, the spreading of “malicious truths,” meaning statements known to be incorrect and said simply to incite chaos, are not helpful to society.<sup>144</sup> Feinberg cites the 1919 landmark Supreme Court case *Schenck v. United States*, in which Justice Holmes stated that even “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”<sup>145</sup> The idea behind Feinberg’s argument against supporting malicious truths is that there are certain things which should be prevented from being said so as to avoid disorder.<sup>146</sup>

Feinberg also argues, under a theory frequently called the “fighting words doctrine,” words and rhetoric that might provoke retaliatory violence should similarly be restricted despite protections afforded by the First Amendment.<sup>147</sup> Feinberg argues the law rightfully discourages uttering words that can inflame people or that are likely to provoke a violent action.<sup>148</sup> Ultimately, Feinberg considers statements falling into any of the above enumerated specific categories as either being so inflammatory and upsetting or, as to indisputably untrue statements, offering no legitimate value to the public at large, and is thus speech that could (and should) be rightfully restricted.<sup>149</sup>

Conversely, there are many prominent judicial theorists who believe society should have to tolerate all speech, regardless of how inflammatory, upsetting, or untrue. Charles Lawrence argues that if the government or any other entity restricted an individual’s free expression merely because it was upsetting or seemingly so outrageously untrue as to be injurious, then some of the most significant and fundamental Supreme Court decisions would not have ever made their way to court.<sup>150</sup> Lawrence specifically uses *Brown v. Board of Education* as an example, and argues that even though segregation was an ingrained American truth at the time of the *Brown* decision, had the suit not been brought, the issue of segregation likely would have not been

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144. See Feinberg, *supra* note 24, at 386.

145. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

146. See Feinberg *supra* note 24, at 386.

147. See Feinberg, *supra* note 24, at 388.

148. See Feinberg, *supra* note 24, at 388.

149. See Feinberg, *supra* note 24, at 388.

150. See Charles Lawrence & Gerald Gunther, *Good Speech, Bad Speech*, STAN. LAW. MAG. (June 3, 1990), <https://law.stanford.edu/stanford-lawyer/articles/good-speech-bad-speech/>.

challenged, and thus, the change and betterment to society resulting from the decision would not have occurred.<sup>151</sup>

With that said, Lawrence does make the explicit point that some hate speech is either so racist or so otherwise hostile that it should be restricted simply for being the epitome of speech that serves no legitimate purpose or function and makes no legitimate point.<sup>152</sup> He explains that the First Amendment should be used for the promotion of truth.<sup>153</sup> He also states speech conveyed with the sole intention of hostility does not communicate ideas but is rather used merely to produce injury.<sup>154</sup> He further argues speech meant to hurt and not to inform or create dialogue could have the effect of inhibiting the discovery of truth.<sup>155</sup>

Ultimately, the question comes down to whether certain speech which is meant to solely hurt is still validly protected by the First Amendment. It has long been debated whether there is an advantage to having false information out in the public domain.<sup>156</sup> While the theorists above seem to agree information that is strictly injurious and provides little other benefit should not be allowed, there is still a lingering question regarding whether having bad information helps the public discern what is right versus wrong and true versus false.<sup>157</sup>

This perplexing question is especially critical when considering the legitimate proof that inaccurate and unverified information is harming the public in various ways, including influencing national presidential elections.<sup>158</sup> Under such circumstances, it is essential to explore the parameters of the responsibilities mentioned above. It is important to consider the extent of the language allowed on these social media and internet platforms, as well as the appropriate limits to censoring the content, news, and information posted by active and loyal users of these sites. The ultimate issue is determining just how explicitly inaccurate or injurious the content, news, and information can be before it should be properly and constitutionally regulated or censored.<sup>159</sup> A lack of consensus among the general public, combined with the absence of

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151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See* Feinberg, *supra* note 24, at 380–81.

157. *See* Feinberg, *supra* note 24, at 394.

158. *See* Masha Gessen, *Russian Interference in the 2016 Election: A Cacophony, Not a Conspiracy*, THE NEW YORKER (Nov. 3, 2017), <https://www.newyorker.com/news/our-columnists/russian-interference-in-the-2016-election-a-cacophony-not-a-conspiracy>.

159. *See* Sherif Elsayed-Ali, *Commentary: How to Stop Social Media from Supercharging Hate Speech*, REUTERS (Feb. 23, 2018), <https://www.reuters.com>

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any legal guidance, leaves social media and internet companies to create their own policies regarding fake news and censorship.

#### D. The Final Answer

Social media platforms walk a fine line regarding what content, news, and information they can restrict and how they can properly and constitutionally do so.<sup>160</sup> Courts have opined that “a social media platform amplifies the distribution of the speaker’s message—which favors . . . free speech interests—but also increases the potential, in some cases exponentially, for . . . disruption.”<sup>161</sup> The analysis gets even more challenging when considering how free speech affects American citizens. While there are certain ideas that can be legitimately restricted because they are indisputably considered to incite violence or be generally offensive, the majority of the content posted and promoted on social media sites constitute, the legitimate thoughts and feelings of the public.<sup>162</sup> And, while those ideas might be offensive to some, it is important to recognize they often represent another person’s truth.<sup>163</sup> Further, the expression of those truths forms the foundation of a democratic, open society.<sup>164</sup>

The ability to express unpopular feelings in the face of oppression or conflict, or in the face of the people in power, is a fundamental pillar of the freedom upon which the United States was built and prides itself.<sup>165</sup> To restrict the speech of one initiates a slippery slope which could result in a larger restriction on many.<sup>166</sup> Nevertheless, social media sites have been used, in the past years more than ever, to “promote hateful rhetoric, to control . . . citizens, and to silence any opposition.”<sup>167</sup> Thus, despite the difficulties, criticism, and backlash social media companies might face, they have a responsibility to monitor the content posted and promoted on their sites.<sup>168</sup> The following section analyzes and provides a suggestion regarding the most effective and least restrictive ways to do so.

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[.com/article/us-elsayedali-hatespeech-commentary/commentary-how-to-stop-social-media-from-supercharging-hate-speech-idUSKCN1G72UU](https://www.uskcn1g72uu.com/article/us-elsayedali-hatespeech-commentary/commentary-how-to-stop-social-media-from-supercharging-hate-speech-idUSKCN1G72UU).

160. *See id.*

161. *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016).

162. *See* Elsayed-Ali, *supra* note 159.

163. *See* Elsayed-Ali, *supra* note 159.

164. *See* Elsayed-Ali, *supra* note 159.

165. *See* Elsayed-Ali, *supra* note 159.

166. *See* Elsayed-Ali, *supra* note 159.

167. *See* Elsayed-Ali, *supra* note 159.

168. *See* Elsayed-Ali, *supra* note 159.

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## V. CONFRONTING AND HANDLING THE PROBLEM

As exemplified in this Comment, the reach of social media platforms has increased significantly in recent years. The far-reaching influence of these social media platforms dictates new responsibilities, duties, ethical and moral obligations, and creates novel challenges.<sup>169</sup> Specifically, social media sites must learn how to balance the freedom of expression with the ability to monitor and restrict the content, news, and information posted on their sites.<sup>170</sup> Social media platforms must realize they have an absolute duty to both American citizens and users around the world to promote accurate information, to restrict hateful and hostile ideas that might incite violence, and to be responsible for the content promoted on its platforms.

Social networks are faced with a catch-22.<sup>171</sup> As exemplified above, there is incredible resistance coming with attempts to restrict any form of expression. However, social media companies have also faced criticism for not adequately monitoring the information posted on their sites which causes them to function as a vehicle for the dissemination of fake news.<sup>172</sup> So what is the best solution for social media platforms? And how should they handle this issue to satisfy both proponents of regulation and proponents of free speech? The rest of this section will explore suggestions to confront this difficult balancing act.

### A. Monitoring Users

Social media platforms should start by ensuring that the users creating the profiles are actual human beings. Social media sites often allow users to have multiple profiles.<sup>173</sup> In doing so, social media sites are essentially allowing users to abuse its platforms by allowing anyone to create accounts for “bots” or use multiple accounts to amplify their messages.<sup>174</sup> This phenomenon is exemplified by Facebook’s recent reveal that there are an estimated

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169. See Elsayed-Ali, *supra* note 159.

170. See Elsayed-Ali, *supra* note 159.

171. See Elsayed-Ali, *supra* note 159.

172. See David Schaper, *Are Social Media Sites Doing Enough to Combat Rumors and False News?*, NAT’L PUB. RADIO (Oct. 29, 2017), <https://www.npr.org/2017/10/29/560569373/are-social-media-sites-doing-enough-to-combat-rumors-and-false-news>.

173. See generally *How to Manage Multiple Accounts*, TWITTER, <https://help.twitter.com/en/managing-your-account/managing-multiple-twitter-accounts> (last visited Mar. 15, 2018); see also *Can I Create Multiple Accounts?*, FACEBOOK, [https://www.facebook.com/help/975828035803295?helpref=uf\\_permalink](https://www.facebook.com/help/975828035803295?helpref=uf_permalink) (last visited Dec. 29, 2018) (instructing users on “using your profile to represent something other than yourself”).

174. See *The Top 20 Valuable Facebook Statistics*, ZEPHORIA, <https://zephoria.com/top-15-valuable-facebook-statistics/> (last visited Feb. 5, 2019).

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eighty-three million fake profiles on Facebook.<sup>175</sup> Requiring social networks to verify its users would prevent this abuse.

In addition, allowing users to maintain multiple profiles ultimately gives them the ability to separate their public persona from their private one. In so doing, individuals can completely disassociate views and opinions they might hold privately from the views they convey publicly. Specifically, in maintaining multiple, distinct profiles on social media platforms, individuals can create one account publicly portraying an image of themselves which they prefer but also allows for them to post ideas on a separate, more private, or unaffiliated account, allowing them to speak their mind with no repercussions.

While the public persona connected to a person's public profile (the profile chosen by the user to be viewable by all) might reflect accepted societal views, the alternate profiles disassociated with the user's public persona allow users to remain somewhat anonymous. Thus, users are allowed to post whatever opinions or ideas they desire regardless of how opinionated or inflammatory. While this could potentially be helpful for individuals seeking support in online groups and who would like to remain anonymous for legitimate reasons, it also allows individuals posting hostile or hateful speech to similarly remain anonymous and escape being held responsible for the ideas and rhetoric they promote online.

Further, allowing this kind of unaccountability for posts that might be hateful or hostile can have additional significant consequences. For example, many anonymous users promoting hateful views could unite under their aliases and unaffiliated personas to form hate groups. It could additionally allow for the promotion, and even rise, of anonymous figures who promote radical and inflammatory information and opinions. However, by allowing users to maintain only one profile, social media platforms could hold users accountable for the content they post. Users will likely be less willing to promote views and ideas that are hostile, hateful, or socially unacceptable if they know they will be publicly associated with those views. This alone could prevent a substantial amount of hateful speech from occurring simply by deterring it through holding those with hateful views accountable.

Some might oppose this view and advocate for the ability to speak and express ideas anonymously. Opponents to this idea might argue anonymity online also has significant benefits to users who might need to remain anonymous for reasons legitimately in their interest. This is a valid point. There are certainly forums in which people should be able to express their ideas, opinions, and feelings anonymously. There are people who might suffer from very personal issues which are best handled when a person can hide their identities from the public at large through an alias or alternate persona. However, with the advancement of technology, there are surely ways in which a person could join a group anonymously while still maintaining only a single profile.

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175. *See id.*



Social media platforms, with ever-developing algorithms and coding advancements, should be tasked with creating a safe way for users to create or be assigned usernames which protect their identities when joining certain groups. Certain types of groups, such as support groups, should allow anonymity, and social media sites and platforms should be responsible for facilitating a safe way for users to participate anonymously in these groups. However, social media sites should similarly have the ability to monitor these groups and the happenings within each group. Sites and platforms should monitor what the groups are being used for: support groups should be monitored to ensure anonymity and support purposes, and groups promoting hateful and hostile ideas and rhetoric should be monitored to prevent the incitement of violence.

While many may argue that even those who participate in the promotion of hate speech should be afforded the protections of the First Amendment as well as anonymity in promoting their ideas, the two arguments are somewhat contradictory; it seems entirely unproductive to fight to protect the right to freely express ideas with which you are not willing to personally associate. It is one thing to want to remain anonymous in seeking support for issues with which one needs legitimate help, especially in instances where one might not yet be ready to handle the response they might receive from their community. It is another thing entirely to protect those who are using a separate persona to promote hate and to commune and organize with others with similar hateful ideas and opinions. Forcing people to maintain only one profile, and thus holding them accountable for their posts and opinions, will subsequently encourage people to still share their ideas and personal views but to do so without promoting violence. In implementing this idea, social media platforms should use the resources available to ensure that users are creating and maintaining only one profile and that the individuals behind each profile are actually people, rather than governmental entities, bots, hackers, or those using multiple profiles solely to reach larger audiences for injurious reasons.

## **B. Monitoring Groups**

In addition to a formal strategy for filtering out users with multiple profiles, I would suggest that social media platforms similarly have a function for filtering groups created on their sites. Many social media sites allow for the creation of “groups” which generally consist of individual users who come together to discuss a certain topic.<sup>176</sup> While these groups often serve as support systems for individual users or constitute a healthy discussion board, they also have the potential to be a main source of hateful and hostile speech

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176. See generally *How Does Facebook Suggest Groups For Me to Join?*, FACEBOOK, [https://www.facebook.com/help/1210322209008185/?helpref=hc\\_fnav](https://www.facebook.com/help/1210322209008185/?helpref=hc_fnav) (last visited Feb. 5, 2019) (explaining that Facebook suggests groups a certain individual user might like based on various factors such as pages the user has liked, groups the user’s friends have joined, and groups similar to other groups the user has joined).

or false and inaccurate information.<sup>177</sup> Accordingly, social media sites have a responsibility to implement a monitoring or filtering system identifying specific groups which may pose problems, frequently promote hateful and hostile ideas, or post materials that could incite violence.<sup>178</sup> The advancement of technology has certainly made available resources which social media platforms could utilize to find certain groups or community-targeted pages that might raise problems.

Monitoring online groups would also allow social networks to identify individuals posting hateful ideas or false information. Assuming those who post strongly-opinionated material online surround themselves with other like-minded individuals and users,<sup>179</sup> online groups likely will identify more people with similar beliefs. In the case of users who hold hateful and hostile ideas, this feature would be especially beneficial in providing the site or platform with the opportunity to ensure that the user's hostile or hateful beliefs are not substantiated or furthered by fake news. Specifically, sites can ensure the algorithms which determine what content to promote on a user's feed are not promoting the continuation of the user's hateful beliefs.

If preventing the use of certain groups or group pages is impractical or even impossible, social media sites should still be responsible for warning about any biased or potentially inaccurate content that could be posted on such pages, and this content should raise red flags to the site. Groups tending to promote strong feelings regarding a controversial topic might be spreading misinformation from unreliable sources, knowingly or not. Misinformation and fake news are exactly what social media companies have the ability and responsibility to filter out and prevent from being spread.

Alternatively, a strategy for social media companies to filter through accurate content, news, and information and to distinguish it from fake news might be to identify sources that are generally considered reliable. Many social media companies identify and verify the personal, online accounts of high-profile individuals and celebrities. These companies could easily do the same for reliable news sources. In practice, this would mean articles written and/or posted by trustworthy publications such as *The New York Times*, *The Huffington Post*, academic journals, or other reliable and unbiased news sites would be designated in some way as a dependable source. The lack of such designation would subsequently alert people to the possibility of inaccurate, biased, or false information contained in any given post. If unable to effectively sort through information and to filter out unreliable sources and arti-

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177. See *Hate on Social Media*, SAFEHOME.ORG, <https://www.safehome.org/resources/hate-on-social-media/> (last visited Mar. 17, 2018).

178. See Elsayed-Ali, *supra* note 159.

179. See *Definition of Groupthink*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/groupthink> (last visited Feb. 5, 2019) ("A pattern of thought characterized by self-deception, forced manufacture of consent, and conformity to group values and ethics.").

cles, then social media platforms have, at the least, the duty to warn readers and users about the possibility of misinformation.

### C. Monitoring Information

In accordance with the sentiments of Justice Holmes in his opinion stated above,<sup>180</sup> individuals should not be allowed to knowingly and maliciously promote false or inaccurate information. Thus, social media platforms have a responsibility to filter through the content posted on their sites and remove any false content, news, and information.<sup>181</sup> While this may be a burdensome and laborious task to impose on social media platforms, it is, nonetheless, entirely necessary. Because social media platforms are responsible for promoting ideas on a scale far larger than what people would normally have access to, these companies also have a duty to ensure the information being promoted has at least some modicum of merit.<sup>182</sup> Despite the arguments from the theorists cited above which consider the advantages and benefits of exposure to clearly inaccurate information, knowingly promoting false information on such a wide scale, or not caring about the accuracy of the information being disseminated, is a violation of an ethical duty that all social media platforms have to the public.

While this duty might not have been as prevalent when these platforms were initially created, with the growth and increased use of these sites and platforms, and with the reach and number of users who rely on the information distributed on these sites and platforms, it is entirely fair to hold social media platforms responsible for the information its sites promote.<sup>183</sup> This kind of regulation can take many forms. Social media companies might employ a formal fact-checker to verify the content being posted. They might utilize the above strategy of identifying and verifying consistently reliable news sources. Alternatively, social networks could develop automated systems for identifying extreme headlines or certain sources that are consistently unreliable. Whatever the strategy, social media companies absolutely have the responsibility to use their resources to implement some sort of regulating or monitoring system which prevents the dissemination of blatantly false or inaccurate information.

## VI. CONCLUSION

The increased use of technology in society today has allowed for the creation of platforms that reach more individuals than ever before.<sup>184</sup> People

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180. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

181. *See* Schaper, *supra* note 172.

182. *See* Schaper, *supra* note 172.

183. *See* Elsayed-Ali, *supra* note 159.

184. *See Social Media Statistics and Facts*, STATISTA, <https://www.statista.com/topics/1164/social-networks/> (last visited Mar. 3, 2019).

can connect to others in different countries through social media sites that are used daily by a significant percentage of the world's population.<sup>185</sup> With the number of different social media platforms available to users and consumers today, and with the numerous types and forms of technologies that consumers and users can use to access these social media platforms, the prevalence of these platforms is only projected to grow.<sup>186</sup>

While the increased use of social media has hugely beneficial implications for the platforms themselves and for technology generally, the consequences that accompany the changes in the use of any technology must be considered and dealt with appropriately. As recent events have shown, social media platforms specifically have been used for both beneficial and detrimental purposes.<sup>187</sup> A fundamental function of these social media platforms, which has been highlighted through the increased use of these various platforms, is that the messages people convey on these sites and platforms, and the information posted, have a significant reach.<sup>188</sup>

Unfortunately, this particular function of these sites has been used to spread hateful rhetoric and blatantly false news and information.<sup>189</sup> The negative consequences resulting from the spread of this hateful and inaccurate information have caused society to hold social media platforms responsible for this dissemination of misinformation<sup>190</sup> and have, subsequently, placed a duty on social media platforms to filter the information and messages being expressed and promoted on their sites.<sup>191</sup> Though at first glance, this responsibility may appear to place an undue burden on social networks, in reality, there are many means for these companies to reasonably monitor the content on their sites.<sup>192</sup> Whether social media companies choose to regulate the information, the sources, or the users themselves, these companies have a responsibility to ensure they are not promoting hateful speech or fake news.<sup>193</sup> For that reason, this Comment suggests social media platforms implement some sort of filtering function to monitor the content being posted by their users.

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185. *See id.*

186. *Id.*

187. Schaper, *supra* note 172.

188. *Social Media Statistics and Facts*, *supra* note 184.

189. Schaper, *supra* note 172.

190. Schaper, *supra* note 172.

191. Sarah T. Roberts, *Social Media's Silent Filter*, *THE ATLANTIC* (Mar. 8, 2017), <https://www.theatlantic.com/technology/archive/2017/03/commercial-content-moderation/518796/>.

192. *See id.*

193. *See* Elsayed-Ali, *supra* note 159.

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The First Amendment considerations accompanying this kind of burden are substantial.<sup>194</sup> Social media platforms are used to connect with others, collect information, and express ideas. However, these platforms are increasingly being used to promote hateful and hostile ideas and rhetoric.<sup>195</sup> Hateful messages that are sufficiently offensive or hostile warrant regulation. While it is true the First Amendment protects the expression of free speech and thus protects many of the ideas and opinions promoted on social media sites, the First Amendment does not protect any form of expression which is so offensive as to incite violence, and it does not protect blatantly false speech.<sup>196</sup>

For that reason, social media platforms have a responsibility and duty to their users, American citizens, and the world at large to monitor what is being posted on their sites so as to prevent the spread fake news and discourage speech that is hateful and hostile. Further, users of social media sites should demand accountability from social media companies and hold them responsible for the information they are distributing. The reach, use, and reliance on social media platforms mandates that these platforms implement some procedure by which to balance the freedom of expression with the regulation of harmful messages and fake news.

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194. See Lawrence & Gunther, *supra* note 150.

195. *Hate on Social Media*, *supra* note 177.

196. *Schenck v. United States*, 249 U.S. 47, 52 (1919).